FOR ARGUMENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
*Petitioner,*

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF FOR RESPONDENTS

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## QUESTIONS PRESENTED

1. When should local government bodies be afforded some form of official immunity similar to the qualified good faith immunity available to local officials in their official capacities under *Scheuer v. Rhodes* and in their individual capacities under *Wood v. Strickland*?

2. When can qualified good faith immunity render inappropriate the award of equitable relief, declaratory judgment, or attorneys fees?

## STATUTORY PROVISIONS INVOLVED

In this section of his brief, plaintiff does not set forth verbatim, or refer to, any policy statement, ordinance, regulation or decision officially adopted and promulgated by the officers of the City of Independence, Missouri allegedly pertinent to the questions presented as required by Supreme Court Rule 40(1)(c).

Provisions of the Charter of the City of Independence, Missouri involved are, in pertinent part:

> "Section 2.11. Council not to interfere in appointments and removals. Neither the Council, the Mayor, nor any of its other members may direct the appointment of any person to, or his removal from, office or employment by the City Manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. * * *
>
> Section 3.28. Personnel Board: Powers and Duties. The Personnel Board shall * * * (h)ear appeals of officers and employees in the *classified* service who have been * * * removed * * * and report its findings and recommendations in writing * * * to the city manager * * * (who) shall then make (the) final decision * * * regarding the appellant's * * * removal."



## STATEMENT[1]

As recognized by the Court of Appeals, the District Court's findings of fact most accurately provide the background needed for understanding the issues presented in this case. These findings may be found in the appendix to the petition for certiorari at pages A47 through A60.

### The Discharge

For a substantial period of time prior to March of 1972, plaintiff Owen as police chief (serving in the unclassified service) and defendant Alberg, as city manager, had sharp disagreements over plaintiff's administration of the police department, including his supervision of the property room (Pet. App. A49). In early March, 1972, a handgun which should have been destroyed (according to the property room records) was discovered in the hands of a felon. At that time the City Manager initiated an investigation of the property room. Statements were taken and reports made by the City Auditor and the City Counselor. The City Auditor reported that record keeping in the property room was too inefficient to make an adequate audit of the property therein. The City Counselor delivered the investigative reports to the City Manager and reported in writing to him that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room (Pet. App. A50).

On April 10, 1972, the City Manager requested plaintiff to resign and accept another position in the police depart-

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1. Throughout this brief, "Pet. App. at ....." shall refer to the Appendix to the Petition for Certiorari, "App. at ....." shall refer to the Joint Appendix, and "Tr....." shall refer to the transcript of testimony.

ment. On April 11 the City Manager again fully advised plaintiff that he would be discharged if he did not resign and accept the other position. In an informal hearing, plaintiff was informed that the City Manager was dissatisfied with his administration of the police department, including his lack of supervision over the records section; the state of those records; and plaintiff's inadequate administration and lack of control of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people (Pet. App. A51).

On April 13, the City Manager obtained the consent of another police officer to serve as police chief. On April 18, the City Manager implemented his discharge decision by completing the necessary paperwork towards discharge.

On April 15, 1972, three days prior to Alberg's implementation of his discharge decision, Owen requested that Alberg provide him with written notice of the reasons for the termination and a hearing to appeal the discharge (App. at 18-19). On April 26, 1972, after the discharge, plaintiff's attorneys requested "that the attempted action by the City Manager to terminate the term of office of Chief George Owen be certified to the proper board as an appeal from such action." (App. at 26).

These requests were denied, however, because, beyond present dispute, plaintiff had no property interest in his position. All existing rules, case law and regulations available for review by the City Manager indicated that no other procedural protections could be afforded plaintiff, as an unclassified employee than those he had actually enjoyed. A staff of lawyers assured the named defendants that this was the case (Tr. 242, 165, 167); and, at the City Manager's request, directed a letter to plaintiff's attorneys advising them "that there is no appellate procedure



or form provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." (App. at 27; and, see Section 3.28 above in Statutory Provisions Involved).

At no time did plaintiff or his attorneys request a name clearing hearing and only informal hearings before the City Manager were given Owen.[2]

**The Roberts Statement**

Contemporaneously, but without any causal or policy connection whatsoever to the City Manager's acts, a lame duck city councilman, Roberts, unilaterally (Pet. App. at A52) decided that the audit and investigation of the property room should be made public and secretly drafted a statement to be made by him at the City Council meeting on the evening of April 17, 1972. The statement appears *passim* throughout the plaintiff's petition for certiorari and selective references from it appear in plaintiff's statement of the case.

Predictably, both the discharge and the Roberts statement obtained considerable media coverage. Plaintiff (Brief at p. 4) has referred to various articles printed in area newspapers which were admitted conditionally at trial.[3] The City Manager never made any stigmatizing allegations about plaintiff Owen and no statements were placed in Owen's official record which could possibly stigmatize him. A copy of the Council motion, infra, and the

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2. Indeed, although the lack of such a hearing is apparently the constitutional tort plaintiff complains of here, plaintiff has never made a specific allegation in his complaint, or other request, for such a hearing.

3. Defendants objected to these articles because they contained hearsay and were incompetent to show any state action (Tr. 25).

vote on the motion became a part of the City's permanent records as journal entries of the Council meeting (App. at 20-23); however, a copy of the Roberts' statement was not placed in the City's permanent records, and, in any event, the City has had no request for records or other inquiries about Owen from prospective employers (Tr. 81-82; and, 229).

The City Manager did not subscribe to Roberts' accusations and publicly stated before and after the discharge, as did the City Counselor, that there was no indication of any criminal wrongdoing or violation of law by plaintiff (Pet. App. at A14 and A51; Tr. 147; Tr. 224; Def. Ex. 11; Def. Ex. 14). Likewise, the discharge was not based upon Roberts' stigmatizing statement and nothing in the discharge process itself cast a stigma upon Owen (Pet. App. at A37, A44, and A56).

**The Council Motion**

During a regular Council meeting, the City Council for the City of Independence voted to refer "reports concerning police department inefficiencies" (Pet. App. at A4; App. at 20-23) to the prosecuting attorney for presentation to the next grand jury all in accordance with the requisites of Section 540.020 and Section 540.140 Mo. Rev. Stat. which allow the grand jury to "make careful inquiry into the failure of municipal officers to do their duty" and their power "to investigate and return indictments for all grades of crimes." The City Manager subsequently complied with this Council motion; and, the grand jury then returned a "no true bill". Since that time, no further investigation of Owen's administration of the police department has occurred (Pet. App. at A56).



**The Litigation**

Owen brought lawsuits in state and federal court based upon Roberts' defamatory statement and the "contemporaneous" discharge (Pet. App. at A32). Plaintiff's state and federal cases both asked for the same lost income as special damages for the discharge and both asked for the same general damages by reason of the defamation (Def. Ex. 27; Def. Ex. 28; App. at 9-11; Pet. App. at A36-38). Roberts has never been a party in this federal action either in his individual or official capacity. Plaintiff's action in the Missouri courts was against both Roberts and the City Manager Alberg.[4]

On June 25, 1976, the District Court entered judgment for the defendants. The holdings of the trial court found that plaintiff had not been deprived of an interest in liberty without due process for three reasons. First, the only reason for plaintiff's discharge did not impute any illegal, immoral, or other stigmatizing conduct to plaintiff. Second, the statement of Roberts had no causal or other substantial connection to the termination of plaintiff's employment. The decisions and reasons for discharge preceded the Roberts statement and Roberts, as a councilman, was prohibited from participation in the City Manager's plenary authority in personnel matters. (Section 2-11 Statutory Provisions Involved, supra). Third, plaintiff was completely exonerated from any charges of illegal or immoral conduct by public statements of both the City Manager and City Counselor and by the grand jury's return of a no true bill. The District Court further concluded that even if plaintiff could have been held to have estab-

4. Owen eventually dismissed the City Manager from the state case (along with allegations of a conspiracy between the City Manager and Roberts) and, subsequently, obtained a financial settlement against Roberts for the Roberts statement on his state petition for libel, slander and malicious prosecution.

lished the threshold question of a deprivation of liberty without due process, the defendants established the existence of a "good faith" defense. The trial court further held that, because of their legislative functions, the immunity of city council members may be even broader than that accorded by the "good faith" defense (Pet. App. A65-A67; A68-A71; and A78).

On appeal, the United States Court of Appeals for the Eighth Circuit reversed and remanded on the issue of damages. Plaintiff's most recent statement of the case in his brief contains selective references from the Court of Appeals discussion of how their conclusions of law differed from those of the trial court (Pet. Brief at 3-6). The most critical difference of opinion lay in the majority's view of the Roberts defamation as the "fact of prime importance," not the fact that the discharge itself was based upon reasons which "did not relate to Owen's honesty or integrity" (Pet. App. A31-32; A37). The majority was primarily concerned about the appearances "in the eyes of the public" regarding the discharge, the Roberts statement, and the Council motions—where "the fact of the discharge, the Roberts statement, and the Council action received great publicity, and the newspapers linked the discharge to the investigation." (Pet. App. A31). Thus, the majority felt that the Council "appeared to lend support to the Roberts charges by resolving that the investigative reports be referred to the County Prosecutor for presentation to the grand jury." The crux of the appellate court's disagreement with the trial court (and with the dissenting opinion at Pet. App. A41-A45) may be found in the following holdings of the majority:

> "The fact of the actual stigma to Owen connected with his discharge is undeniable, for the action of the City of Independence as employer[5] served to blacken Owen's name and reputation. That the stigmatizing charges did not come from the City Manager and were not included in the discharge notice is immaterial, because the official actions of the City Council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge. It is the fact of the City's public accusation which is of prime importance, not which official made the accusation." (Pet. App. A31-A32)



The majority's opinion (Pet. App. A8-A45) was vacated on June 26, 1978, by this Court (Pet. App. at A79) and remanded for further consideration in light of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The remand opinion of the appellate court readopted the above quoted holdings (Pet. App. at A3-A4); but, held "in the particular circumstances of this civil rights action" that the City of Independence was entitled to qualified immunity from liability (Pet. App. A4-7)—thus, modifying its prior opinion (Pet. App. A38-41).

Both the original opinion and the remand opinion were panel opinions with Senior Circuit Judge Van Oosterhout concurring in the result on remand but adhering to his views as expressed in his dissenting opinion in the former appeal (Pet. App. A41-45).

On remand, the Court of Appeals affirmed the judgment of the District Court, denying plaintiff any relief against the defendants in this case.

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5. We must assume that the court meant "employer (of Roberts)" since Roberts alone made the defamatory statement.

## SUMMARY OF ARGUMENT

1. Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a local government body can be liable only where its official policy is responsible for a deprivation of rights; and, policy can only be made in two ways: first, where it is "officially adopted and promulgated by that body's officers"; and, second, through practices where policy comes into existence by reason of persistent, widespread, permanent, well settled, deeply imbedded, or traditional "customs or usages with the force of law".

2. However, "a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory." Thus, when policy itself is not at issue in a case or the policy itself is valid, the unconstitutional conduct of a municipality's employees cannot be imputed to its employer.

3. Accordingly, after *Monell*, distinctions must be drawn between conduct and the policy itself—between a "conduct case" and a "policy case".

4. A plaintiff's prima facie case will involve different elements in a conduct case than in a policy case. In a conduct case, a plaintiff must show state of mind (as a basis of liability), duty, proximate cause, and cause in fact. Generally, state of mind proofs will require a showing of intent, or extremely gross negligence (although it would appear that the nature of the constitutional right itself is relevant as to the degree of culpability which must be shown). In a policy case involving a rule of general applicability and future effect, state of mind as a basis of liability is largely inapplicable. In a policy



case the plaintiff has a heavy burden of proof of showing beyond a reasonable doubt that the policy is without any rational basis and that its constitutionality is not fairly debatable.

5. Just as a plaintiff's prima facie case differs in policy and conduct cases, likewise, the entity's defenses in policy cases and the individual's defenses in conduct cases differ. In a policy case, the entity, without the necessity of pleading an affirmative defense, might argue on facts other than those present in its own case, to show that some rational basis for the policy exists. In a conduct case, the defendant bears a burden of proof involving both an objective and subjective test of good faith. The subjective test requires that the defendant show that he acted without malice. The objective test requires a showing that he did not act in disregard of settled, indisputable law and that, otherwise, he also had reasonable grounds for his action.

6. The individual's defenses in conduct cases should also exist as a defense for the entity itself if and when the entity can be held liable, under any circumstances, for the conduct of its employees. Similarly, if an employee can be sued in a policy case, the plaintiff should still bear the burden of proof stated above to overcome the deference to such a policy demanded by the separation of powers doctrine. A strong presumption of validity should always attend true policy.

7. An individual's qualified good faith immunity in conduct cases is a defense on the merits that defeats liability for any relief against any defendant, either in equity or law. This is true because the plaintiff's cause of action in a conduct case involves tort concepts requiring proof of state of mind, duty, proximate cause, and cause in

fact; and, defendant's good faith defense is a complete defense on plaintiff's prima facie case in these regards. The objective part of the defense bears on a plaintiff's proofs concerning duty, proximate cause, and cause in fact whereas the subjective test bears on state of mind.

8. The case at hand was pleaded and proved as a conduct case against all defendants, including the City of Independence. All defendants, including the City, pleaded and proved a conduct defense on the merits, alleging qualified good faith immunity. Assuming that the Eighth Circuit Court of Appeals was correct in its finding that the City, as an entity, could be held liable for the conduct of its high ranking employees, the court correctly allowed the City to defend on the merits of plaintiff's prima facie case in that regard.

9. If and when local government bodies may fairly be said to be liable for the conduct of their public officers and employees, failure to allow a defense on the merits regarding the good faith of such employees would render a municipality strictly liable. The cost of good faith deprivations of constitutional rights should not be internalized to create open-ended liability which would treat the City treasury as a fund for mutual insurance.



## ARGUMENT

### I.

### The Significance of *Monell* in Defining the Considerations Applicable to Decision of the Issues Presented.

#### Immunity From Suit Abrogated

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 663 (1978) this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961) "insofar as it holds that local governments are wholly immune from suit under Section 1983."

*Monell's* analysis of the legislative history of the Civil Rights Act of 1871 found that *Monroe* incorrectly equated that part of the debates expressing fear that "Congress had no constitutional power to impose any *obligation* upon county and town organizations" with a limitation on "constitutional power * * * to impose *civil liability* on municipalities." *Id.* at 664-665 (court's own emphasis). The Court concluded, therefore, that local governing bodies[6] can be held liable when a plaintiff alleges and proves "that official policy is responsible for a deprivation of rights protected by the constitution." *Id.* at 690.

Thus, under *Monell*, "municipalities are not liable for their acts, even if unconstitutional, but only for their policies." (Amici Brief of American Civil Liberties Union, et al. at p. 8).

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6. The City of Independence is a constitutional charter city organized and operating with home rule powers pursuant to Article VI, Section 19 of the Missouri Constitution; notwithstanding, we do not take issue with the proposition that has been made elsewhere that terms such as "local governing bodies", "cities" and "municipalities" need not be distinguished for purposes of analysis of the issues raised herein from counties, school districts, and so forth.

Since the facts in *Monell* unquestionably involved "official policy as the moving force of the constitutional violation" and since no question was before the Court involving "whether local government bodies should be afforded some form of official immunity," the Court left difficult line drawing problems for another day as to "what the full contours of municipal liability under § 1983 may be." *Id.* at 695 and 701.

**The Conduct Case Versus the Policy Case**

*Monell*, on its facts, involves a citywide regulation that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The acts (or conduct) of New York's employees were not challenged—therefore the case "clearly involves official policy and does not involve respondeat superior."[7] *Id.* at 701.

The Court carefully stated that a "policy case" such as *Monell* arises only when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" was involved.[8] *Id.* at 690.

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7. Perhaps recognizing the strained, inconsistent and confusing limitations upon the availability of suit against municipalities under Section 1983 prior to *Monell*, the Court declined the opportunity to explore the wisdom of *Monroe* and other pre-*Monell* Supreme Court cases in order to decide whether or not such cases were correct on their facts when the principles of *Monell* were taken into consideration. These prior cases insofar as they discussed municipal liability, could not possibly have involved the same concepts of official policy and *respondeat superior* as in post-*Monell* cases. For similar reasons, we suggest that plaintiff's extensive reliance on earlier opinions of the lower courts (Pet. Brief at pp. 28-30 and pp. 33-35) misses the monumental importance of *Monell* where that case distinguishes, as we shall see, between a "policy case" and a "conduct case".

8. One other way, and one other way only, that a "policy case" can come into existence, under *Monell*, is through practices which were so persistent, widespread, permanent, well settled, deeply imbedded, or traditional as to rise to the level of a "custom or usage with the force of law". This type of "policy

*(Continued on Following Page)*



Thus, *Monell* requires in all future cases that distinctions be drawn between conduct, or the acts of the public officers and employees of a municipality, and policy itself.

*Monell* repeatedly underscores that "a municipality cannot be held liable *solely* because it employs a tort-feasor" —or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory. *Id.* at 691. When the policy itself is not at issue in a case (or the policy itself is valid) the unconstitutional conduct of a municipality's employee cannot be imputed to his employer. A cause of action against the employee can, of course, still be stated in what we will term a "conduct case".

In administrative law, a distinction has long been drawn between rule making, the rule itself, and adjudication.[9] For conceptual purposes, it is helpful to analyze *Monell's* treatment of the distinction between conduct and policy in a similar fashion. *Monell* implies that there may

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Footnote Continued—
case" is not present on the facts of this case. However, we note in passing the importance of deciding, in other cases, whether "custom or usage with the force of law" is involved or mere usage. The former is treated with the same deference as public law whereas "usage" (though occasionally used interchangeably with the term "custom") when it is deemed not to have the "force of law" has been viewed as mere conduct or "repetition of acts". Thus, as we shall develop later, mere "usage" may, in some instances, be treated as a "conduct case". Compare *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970); *Nashville, C. & St.L. Railway v. Browning*, 310 U.S. 362, 369 (1940); and, see *Reimer v. Bunbury*, 30 Mich. 201, 214 (1874) (noting that the Constitution is conservatory rather than reformatory and that review of customs previously in use, regarded as necessary in government and sanctioned by usage, must be accorded deference).

9. We do not suggest that this case should have been brought under 5 U.S.C. §501 et seq. The detailed requirements of the Administrative Procedure Act cannot be imported into a constitutional case. Indeed, the federal Administrative Procedure Act is inapplicable to local government bodies.

be "policy making", the "policy itself", and "policy execution".[10]

In general terms, "policy making" should refer to the *conduct* of any officer or employee, regardless of rank, participating in the local government body's processes and practices for adopting, promulgating, formulating, amending, or repealing a policy.

"Policy itself" should mean the whole or part of any statement, ordinance, regulation or other *policy* decision of general applicability and future effect. "Custom or usage with force of law" aside, the policies one will most likely encounter in municipalities are its charter, ordinances, by-laws, and other policy decisions from any officer or employee intended for more than ad hoc application on a particular set of facts.[11]

"Policy execution" should relate to the *conduct* of any officer or employee, regardless of rank, participating in actions which (applying the policy itself to a particular person, acting in the absence of policy, or in violation

10. We do not imply that distinctions, on a case by case basis, will always be readily apparent. For example, in footnote 8, our discussion of usage suggests a potentially difficult situation in distinguishing policy from conduct.

11. This raises questions of whether policy can be made by persons other than the municipality's "lawmakers". A low ranking employee's edicts or acts may conceivably be said to represent official policy if there has been a delegation of autority to make policy ("you decide what disciplinary procedures to use") and a low ranking employee officially adopts a policy within the scope of that delegation (a memo sent around his division or department saying "there shall be no formal or informal hearings prior to disciplinary action in the Street Maintenance Division"). But see Restatement, Second, Agency at p. 2 as discussed in footnote 13, infra.

On the other hand the official conduct of a municipalities' highest ranking officers does not become policy merely because of rank (for example, an incumbent city council could adopt a resolution adjudicating that their opponents in a forthcoming election were guilty of illegal activities). *Id.* at 694.



of policy) results in an order, sanction, or other final disposition (whether affirmative, negative, injunctive, or declaratory in form) which allegedly deprived such person of a constitutional right.[12]

The policy case and the conduct case (for either policy execution or policy making conduct), then, must be viewed as sitting at two different poles. The entity (or its officers sued in their official capacity) should be solely liable where the policy itself is unconstitutional, but no wrongful conduct in making or executing the policy is involved. Individual officers and employees (sued in their individual capacities) should normally[13] be solely liable,

12. Commentators and cases alike, prior to *Monell*, had little need to draw such distinctions between conduct and policy by reason of the holdings in *Monroe* concerning immunity from suit. However, a few articles appeared which tended to recognize these classifications: Chayes, The Role of the Judge In Public Law Litigation, 89 Harv. L.Rev. 1281 (1976); Developments—Section 1983, 90 Harv. L.Rev. 1133, 1227 (1977); and, particularly, the law review article referred to Justice Powell's concurring opinion in *Monell*, Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L.J. 1483 (1977). Likewise, sometimes cases were treated differently if they involved policy, versus conduct. For example, in *Craig v. Boren*, 429 U.S. 190, 204 (1976) the court correctly analyzed the case in terms of issues involving deference and scope of judicial review instead of in constitutional tort terms. However, neither these commentators nor cases had benefit of *Monell;* and, accordingly, they sometimes treated conduct as policy itself, and vice versa.

13. Situations may conceivably be encountered where the individual is not solely liable. In certain cases not involving policy as we have defined it (and usually not involving Section 1983) an individual or group of individuals by their *conduct* can, effectively, bind the City.

The most obvious example would be a Council authorization to the City Manager to enter into a contract on behalf of the City. In such case, if the contract was properly entered into, individual, or collective, conduct of officers and employees breaching that contract might bind the City. This is not to say, however, that traditional agency principles can be applied directly to the activities of governmental officials. Indeed, the Restatement of Agency, 2d Ed. states in its Scope Note at p. 2 that the principles contained therein are not necessarily applicable to public entities.

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on the other hand, where the policy itself is constitutional but either policy execution or policy making conduct is not.[14] This simple declaration drawn from *Monell* (that

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Footnote continued—

A variety of statutory provisions not involved in this case may expressly provide for entity liability for the conduct of officers and employees.

In some instances indemnification laws exist which require municipalities to pay judgments entered against their public officers. In sum, our analysis of liability in the conduct case versus the policy case is tendered not for the purpose of saying that the individual and the individual alone, will invariably be liable for his misconduct but for the purpose of distinguishing between liability rules that should apply in conduct cases versus policy cases.

14. Because verbalizing liability combinations in this regard is difficult, we feel constrained to footnote a model which has been helpful to us in keeping the liability combinations suggested by *Monell* more readily apparent for purposes of analysis:

| I (Pure Conduct Case) | II |
|---|---|
| Policy making-unconstitutional | Policy making-unconstitutional |
| Policy itself-constitutional | Policy itself-constitutional |
| Policy execution-unconstitutional | Policy execution-constitutional |
| **III** | **IV** |
| Policy making-constitutional | Policy making-constitutional |
| Policy itself-constitutional | Policy itself-constitutional |
| Policy execution-unconstitutional | Policy execution-constitutional |
| **V** | **VI** |
| Policy making-unconstitutional | Policy making-constitutional |
| Policy itself-unconstitutional | Policy itself-unconstitutional |
| Policy execution-unconstitutional | Policy execution-unconstitutional |
| **VII** | **VIII (Pure Policy Case)** |
| Policy making-unconstitutional | Policy making-constitutional |
| Policy itself-unconstitutional | Policy itself-unconstitutional |
| Policy execution-constitutional | Policy execution-constitutional |

We do not think that it would serve any useful purpose to compare each of these models to a previously decided case. The opinions in Section 1983 cases do not often discuss the distinction between policy and conduct—again, they had little occasion to do so before *Monell*. We merely suggest that, for conceptual purposes, there clearly can be policy making, policy, and policy execution—with each being quite independent of the other and capable of examination, standing alone, as to its constitutionality. *Monell* is illustrative. There, prior to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974),

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the entity is liable for policy and the individual liable for conduct) is of tremendous importance and should serve as the touchstone for clarifying some of the ambiguities present in the law of Section 1983.

The supposed absence of any means under Section 1983 to provide a statutory method of review of unconstitutional local government policies, during the formulative area of Section 1983 jurisprudence after *Monroe*, resulted in the creation of confusing and difficult doctrines which allowed suit against public officials in their individual, and sometimes in their official, capacities but not against the local government body. Both the legislative history and plain meaning of Section 1983 combined with the fact that the suits were against individuals, purportedly for their conduct, oftentimes resulted in treatment of cases which clearly involved policy, as conduct cases. Frequently, a controversy that was clearly between a private person and the government was transmuted into a controversy between two private persons. By the means of this convenient fiction, the courts were able to exert a significant measure of control over cities and to avoid the intolerable result that literal application of the "non-person" doctrine would have created if a citizen was remediless against harsh and illegal policies of his gov-

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Footnote continued—

the conduct of New York's public officers may have been reasonable and not taken with malice or in the face of settled law in the making of the policy in question. Likewise, other New York public officials may have executed the policy in good faith. The policy itself, however, has to stand on its own merits (although policy, unlike conduct, should not be treated as a tort, even a constitutional tort). Taking a similar view, this Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, ..... U.S. ....., 59 L.Ed.2d 401 (1979) at fn. 29 suggests that the legislation in that case is, conduct aside, itself subject to judicial review. Compare *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) for the proper scope of judicial review of the T.R.P.A. legislation.

ernment. In many such cases, the local government body was a named party but didn't even bother to raise the absolute immunity afforded it by *Monroe*. However, such cases created confusion when the decisions were forced to move in variant directions simply because attacks on government policy itself had to be viewed in the context of conduct of individual officers.

Cases which clearly involved suits against the officer in his individual capacity to recover damages for the agent's tortious misconduct were dealt with easily. Clear and justifiable immunity defenses were developed in relation to these conduct cases—even where the defendants were sued solely in their official capacities. But where a suit was really against policy itself, and, not an action for damages but for prospective, declaratory or equitable relief, some cases granted relief while other cases, bothered by *Monroe,* did not. The courts sometimes expressed concern that the suit was not really against the individual, but against the municipality; and, the courts were understandably troubled, for reasons of public policy and adherence to precedent, about allowing suit against the government based upon such a fiction. Where a plaintiff sought retroactive, monetary relief where a policy itself caused a deprivation, the courts understandably balked in many cases since it had never been the judiciary's function to stop government in its tracks by making it "a tort for government to govern." *Dalehite v. United States,* 346 U.S. 15, 57 (1953) (dissenting opinion). In general terms, after all, both government and individuals are free to engage in many activities that result in harm to others so long as such activities are not tortious. Traditionally, cities could promulgate a wide variety of laws, regulations and policies—not without fear of challenge, but without fear



of their policy being treated as tortious conduct.[15] Basic policy decisions of government are inherently non-tortious.

Occasional violence has been done to this principle in Section 1983 cases where, as here, the courts have treated conduct as policy. Moreover, great harm is presently threatened if the pre-*Monell* fiction of Section 1983 is continued, after *Monell,* to allow policy cases to be treated as conduct cases—to treat governing as a tort.

Suits involving government policy itself, as opposed to conduct, traditionally require careful and deferential consideration of the policy, its legislative history, its arbitrariness and capriciousness, its character, the interests affected, and a variety of factors not present when a court is asked to review wrongful conduct by isolated acts of governmental officials. Section 1983 has been interpreted against the "background of tort liability." *Monroe* at 187. However, now that we have *Monell's* distinction between policy and conduct we must keep firmly in view that tort concepts always involve conduct and never policy itself.

Henceforth, plaintiffs suing under Section 1983 must be asked to frame their allegations so that causes of action differentiate between the policy case and the conduct case.

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15. It does not follow, however, that the making and executing of such policies will invariably involve non-tortious conduct. It is a simple matter to imagine, for example, that policy makers could fraudulently conspire to pass a policy which, though valid on its face, deprived another person of some constitutional right. Likewise, the execution of valid policy could be unconstitutional (such might be the situation with many police brutality cases).

## II.

## A Plaintiff's Cause of Action Will Involve Different Factors in a Policy Case Than in a Conduct Case.

### The Conduct Case and the Constitutional Tort

The term "constitutional tort" was apparently coined in Shapo, Constitutional Tort: *Monroe v. Pape* and The Frontiers Beyond, 60 Nw. U. L.Rev. 277, 323-24 (1965):

> "It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not a 'constitutional law,' but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right. It may well be argued that given the broad language of *Monroe* construing the already broad language of the statute, every policeman's tort and every denial of a license by a state or local board will give rise to an action under Section 1983. The question may be turned around by asking whether it would violate the tenth amendment if Congress passed *Monroe* and its police-tort descendants as a statute."[16]

16. Shapo went on to note that the statute itself, the circumstances surrounding its passage, and logic require application of a standard bearing "an umbilical relation to the statute", which always requires that *"the defendant's conduct be outrageous."* "Harking to the legislative history", Shapo suggested that this standard would call for "a brutality or arbitrariness which goes beyond the garden variety of state tort action." Compare *Baker v. McCollan*, ..... U.S. ....., 61 L.Ed.2d 433 (1979) (Blackmun concurring); Developments—Section 1983, 90 Harv. L.Rev. 1133, 1220; and, Note, Limiting Section 1983 Action in the Wake of *Monroe v. Pape*, 82 Harv. L.Rev. 1486 (1969). This standard has, from time to time, been challenged; however, for our purposes here we merely seek to emphasize Shapo's reference to the legislative history which shows that the statute was primarily intended to address misconduct differing from tort only because of a unique type of constitutional injury going beyond the types of injuries recognized in the state's own tort law. If Shapo was right, *Monell* may have extended a statute which was intended to relate to outrageous conduct, to policy itself.



Thus, in conduct cases brought as "constitutional torts" under Section 1983, a plaintiff's prima facie case has traditionally involved allegations and proof pertaining to basis of liability (state of mind), duty, proximate cause, cause in fact, and actual damages.[17] For our purposes here, we do not seek to fully develop the intricacies of pleading and proof in all "conduct cases"; however, we do suggest that the development of those intracacies by others shows a firm requirement of full proof of these elements in plaintiff's prima facie case—with special emphasis on state of mind. If a plaintiff fails to carry his burden of proof in these regards, he should not have the right to *any* relief, legal or equitable, and, he is not the "prevailing party" for purposes of awarding attorney fees. Usually egregious conduct that "shocks the conscience" must be present—either requiring a showing of intent, or extremely culpable negligence, as part of the basis of liability.[18]

17. "Every person who, under color of (law) * * * *subjects, or causes to be subjected*, any * * * person * * * *to the deprivation* of any rights * * * shall be liable to *the party injured in an action at law*, suit in equity, or other proper proceeding for redress." Little would be served here by an extended analysis of the precise relationship of this statute to such tort concepts. Nahmod, Civil Rights and Civil Liberties Litigation (1979) at pages 59-131 admirably serves this purpose. See also Prosser, The Law of Torts, 4th Ed. (1971); and, Nahmod, Section 1983 and the "Background of Tort Liability", 50 Ind. L.J. 5, 7 (1974).

18. Cases such as *Procunier v. Navarette*, 434 U.S. 555 (1978) and *Baker v. McCollan*, ..... U.S. ....., 61 L.Ed.2d 433 (1979) have attempted to deal with the question of negligence in Section 1983 actions. One reason "that the question whether an allegation of simple negligence is sufficient to state a cause of action under Section 1983 is more illusive than it appears at first blush" may lie in the fact that conduct cases make it "necessary to establish that the official acted with a degree of intent, or extremely culpable negligence, in bringing about the events that caused the plaintiffs' injury", Note, 89 Harv. L.Rev. 922, 953-54 (1976)—whereas the "degree of culpability" relevant in a policy case can be viewed without reference to tort concepts involving basis of liability. Moreover, since Section 1983 merely floats above a sea of constitutional rights and draws its substance from those rights, the degree of culpability varies in relation to the constitutional right involved.

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While a conduct case will require proof of intent or gross negligence, in a policy case, state of mind as a basis of liability is largely inapplicable. Instead, a plaintiff's cause of action in a policy case will not be drawn from a background of tort liability but from a background of a characteristic feature, and one of the cardinal and fundamental safeguards, of the American constitutional system: what has been called horizontal and vertical separation of powers.

**The Policy Case and the Separation of Powers Doctrine**

In policy cases deference, federalism and comity are principles arising from the fear of our forefathers that the power existing in every branch and level of government contained the potential for absolute despotism; and, that in constituting a government, there must be a distribution of that power in order to impose checks and balances upon its public functionaries—judge, legislator, and executive alike. It is beyond the permissible scope of this brief to launch into a scholarly analysis of the scope of limited judicial review of local government policies that these principles require. Suffice it to say that the judicial power to declare policies void must be exercised with restraint, that the policy to be reviewed must be identified precisely (to avoid decision on abstract, hypothetical, or moot constitutional questions), that questions of constitutional invalidity must be raised in a plaintiff's first pleadings, that the plaintiff must have a direct and personal interest in the question, that presumptions of validity require construction where possible in favor of constitutionality, and that attacks on policy which merely argue the wisdom, fairness, justice, or expediency of the policy must uniformly fail. Courts will not substitute their judgment for that of another level or coordinate branch of government. In consequence of the general presumption in favor of the validity of the policies of another level and branch of government and the duty of the courts to resolve all doubts in favor of their validity, the rule is fixed that the party who alleges the unconstitutionality of a policy has a heavy burden in sustaining his claim. Unlike the burden of proof in conduct cases which has merely required proof by a preponderance of the evidence, the burden in policy cases requires a plaintiff to show that no rational basis, which might support the policy, exists. Presumptions of validity require proof showing unconstitutionality beyond a reasonable doubt. Certainly, the availability and scope of judicial review will vary depending upon the facts and circumstances of each case. The principle remains the same; and, as pertains to non-statutory review under principles embodied in the constitution (as opposed to procedures mandated by statutes for review of agency decisions) this presumption of validity attends judicial, legislative, and executive policies. *Pacific States Box and*

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Footnote continued—

Opposing counsel in the case at hand may suggest that basis of liability or state of mind should not receive such emphasis by reason of the statement in *Monroe* that "Section 1983 does not require a specific intent" to deprive a person of a federal right. However, such a statement was accompanied by the further observation that the statute should be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. Specific intent is a phrase most often used in a criminal context where the main distinction between specific intent and general intent is the element of bad or evil purpose which is required for the former. *U.S. v. Haldeman,* 559 F.2d 31, 114 (U.S. App. D.C. 1976). The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. Out of all of this conversation about motive and intent, a number of courts have developed a "prima facie tort" doctrine, the classic statement of which is: "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." Prosser, The Law of Torts, 4th Ed., p. 27 (1971).

*Basket Co. v. White,* 296 U.S. 176, 185 (1935); *United States v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926).

**It Is Not a Tort for Government to Govern**

Tort concepts drawn from application to private persons do not, in many respects, adequately indicate how tort responsibilities of governmental agencies should be allocated—let alone how checks and balances upon separate branches and levels of government should operate. Public entities typically engage in a wide spectrum of activities through their policies which have no obvious private counterparts. Many governmental functions involve inherent exposure to potentially injurious consequences far in excess of the risks normally encountered in the private sector. Indeed, many of the most typical and routine duties of governmental entities (including the functions embraced by legitimate, cost-free, public takings of liberty and property at the expense of private interests) require the making of policy determinations which invariably involve some injury to individuals. If injury is traceable solely to a policy itself and not misconduct, then government should be given "cost free" notice and opportunity to change that policy, if it is unconstitutional. Government hardly could go on if, to some extent, values incident to property and liberty could not be diminished somewhat without paying for every such change in the general law—through damages for tortious conduct or compensation for inverse condemnation.[19]

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19. In *Fred F. French Investing Co., Inc. v. City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976) the Court held that there could be no action in inverse condemnation for governmental regulations but that the remedy for private interests must be to have the regulation declared invalid as an unreasonable exercise of power. An ordinance would be considered unreasonable where it (A) "encroaches on the exercise of private property rights without substantial relation to

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**A Plaintiff Must Bear One Burden of Proof or the Other**

The danger of Section 1983, under decisions prior to *Monell,* was that, in some cases, the plaintiff's burden of proof was made more difficult in a conduct case because policy case elements were imported; while in other cases relief was made more readily available in a policy case by reason of the importation of tort concepts. If a local government body is now both capable of being sued and liable in a conduct case (as the majority below held) then the same principles governing what a plaintiff must allege and prove in order to make a prima facie case will apply regardless of whether the defendant is an entity or an individual.

We have seen that in policy cases, where conduct is not involved, the plaintiff has the burden of proof concerning such "objective" and "subjective" factors as legislative intent and rational basis. In a conduct case, the defendant bears the burden of proof as to a subjective test of whether he acted without malice. The objective test requires that he prove that he did not act in disregard of settled, indisputable law and that, otherwise, he also had reasonable grounds for his conduct. *Wood v. Strick-*

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Footnote continued—

a legitimate governmental purpose," (B) bears no reasonable relation to the ends sought to be achieved, or (C) "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value." Many governmental policies have been declared invalid using similar calculus; however, with few exceptions, the courts have refused to view such policies as sounding either in tort or in "temporary inverse condemnation" of property and liberty rights—thereby also refusing to recognize a right to retroactive, compensatory relief.

We would hasten to add that a plaintiff seeking to challenge policy decisions is not forced to await completion of the injury and occurrence of actual damages (as the express language of Section 1983 might seemingly require). Instead, mere threatened injury can provide sufficient standing to challenge an unconstitutional policy. *U.S. v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669 (1973).

*land,* 420 U.S. 308 (1975); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).[20]

III.

**The Qualified Immunity Available to Local Officials in Their Official Capacities Under *Scheuer v. Rhodes* and in Their Individual Capacities Under *Wood v. Strici land* Should Also Exist As a Defense for the Entity Itself if the Entity Can Be Held Liable, Under Any Circumstances, for the Conduct of Such Officials.**

Qualified good faith immunity in conduct cases is a *defense on the merits* that should defeat liability for any relief, either in equity or law.[21]

We have seen that the plaintiff's prima facie cause of action in a conduct case involves allegations and proof pertaining to the basis of liability (state of mind), duty, proximate cause, and cause in fact. The good faith defense

20. Absolute immunities, whether legislative, judicial or prosecutorial render certain classes of defendants absolutely immune and hence not proper defendants (or amenable to suit) for damages caused by their conduct. Although the district court recognized the possibility that such absolute immunities may be present in the case at hand (Pet. App. A68) they are not involved in the Questions Presented.

21. We realize that there have been pronouncements, which could be read to the contrary, prior to *Monell.* We respectfully suggest that the logic of *Monell* requires that the qualified good faith immunity defense should properly be viewed as a defense on the merits and not a defense which defeats merely a portion of the relief requested (which comes along *after* plaintiff has prevailed on the merits). Likewise, this qualified immunity defense does not have the attributes of an absolute immunity defense which could serve to defeat a Section 1983 action at the outset. Perhaps for these reasons various commentators have been uncomfortable with the term "qualified immunity". We add that there is no true immunity defense which allows the continuation of an unconstitutional *policy.* (Various formal tests, but also practical determinations as to the relative accessibility to evidence, convenience, desire to place handicaps against a disfavored, but permitted defense, and so on would indicate whether it should be an *affirmative* defense on the merits.)



in a Section 1983 conduct case, when analyzed in its objective and subjective parts, is a complete defense on the merits of such a prima facie case. It disproves the merits of plaintiff's case since the objective part of the defense relates to duty, proximate cause, and cause in fact and the subjective part of the defense relates to state of mind.

Thus, exhaustive analysis of the legislative history of 1983, the common law and policy considerations should not be necessary merely to determine whether a plaintiff has pleaded and proved the elements of his prima facie case. And, if a conduct case is properly pleaded, we should look to see whether plaintiff carried his burden of proof as to *all* defendants, not merely those who were sued in their individual capacities.

In this case, the Eighth Circuit, as we shall see, noted that the conduct of the City's highest ranking employees could "fairly be said to represent official policy" (Pet. App. A3). We need not quibble at this juncture with this conclusion of law; however, it does suggest a rather important point: namely, if the entity, under any theory, can be held liable for the conduct of its employees, regardless of their rank, the Court cannot summarily jettison either elements of plaintiff's prima facie case or elements of a defense on the merits thereof. The entity should be given a conduct defense in a conduct case. Without exception, the decisions since *Monell* have tacitly recognized this fact. *Bertot v. School District No. 1,* Slip Opinion No. 76-1169 (vacated pending rehearing en banc); *Sala v. County of Suffolk,* 604 F.2d 207 (2nd Cir. 1979); *Ohland v. City of Montpelier,* 467 F.Supp. 324 (D.C. Ver. 1979); *Leite v. City of Providence,* 463 F.Supp. 585 (E.D. R.I. 1978); and, *Shuman v. City of Philadelphia,* 470 F.Supp. 449 (E.D. Pa. 1979).

Plaintiff's case on deprivation of liberty, as alleged and proved, related to conduct which occurred on and immediately before April 18, 1972. He complained of an audit and an investigation of the police department which preceded the police chief's discharge. He complained of an adjudication by by the Council that the grand jury should review the 27 voluminous investigation reports upturned by the audit. He complained that the City Manager should have based his discharge upon reasons other than the fact that plaintiff was "terminated under the provisions of Section 3.3(1) of the City Charter" and that he was denied an appeal of the discharge, although he twice requested such an appeal—first, three days before his discharge and second, approximately a week thereafter. (App. 18, 26-27). Most of all, he complained of a lame duck City Councilman's defamatory statement made in the waning moments of that Councilman's last Council meeting.[22]

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22. Opposing counsel would not contend that the defendant City, as an entity, could be sued for the conduct of its municipal court judges (clearly high ranking officials). Nor, would they argue that, although the absolute immunity of the judge from suit would protect the judge as an individual, the City (or the judge sued in his official capacity) could be sued without regard to an absolute immunity defense. By the same token, if in addition to the judge's conduct, unconstitutional official policy caused that conduct or combined with the unconstitutional conduct, then the City could be liable for its policy but not for the conduct of the judge.

A similar analogy is suggested by *Lake Country Estates v. Tahoe Regional Planning Authority*, ..... U.S. ..... 59 L.Ed.2d 401 (1979). If Roberts would have, as a legislator, enjoyed absolute immunity for his defamatory statement about another public figure by a mere trick of pleading can plaintiff sue the entity instead of Roberts and avoid the defense? This cannot be the law. Plaintiff must point to some policy that caused the defamatory statement; and, here, far from causing the statement, the City's Charter was constructed to prohibit councilmanic interference with members of the administrative service, including plaintiff. (See Section 2.11, Statutory Provisions Involved, supra).

The obvious First Amendment overtones to this case will merely be noted so as not to make resolution of this case

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In short, plaintiff's complaint alleged that defendants' conduct "*purposefully* subjected plaintiff, a citizen of the United States, to deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States" (App. at 9). These allegations were made against all defendants, both the individual defendants sued in their official capacity and the City itself and were denied by all defendants. Plaintiff's proofs related to this alleged misconduct and defenses by all defendants related to this alleged misconduct.

Policy, as opposed to conduct, was discovered by the plaintiff only after the Eighth Circuit's original opinion had been vacated by this court on June 26, 1978 and remanded to the Eighth Circuit for further consideration in light of *Monell*.

Had this case been treated by the lower courts prior to *Monell* as a policy case, we would have seen discussion of the scope of judicial review and of the deference due to such policies. As suggested by Justice Powell in his concurring opinion in *Monell*, we would have looked, not at the silence of policies and customs as they pertain to plaintiff's allegations but "for the affirmative implemen-

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Footnote continued—

any more complicated than necessary. This case involved as its "fact of prime importance" (Pet. App. A31-32) a statement made by a legislator in a regular session of a Council meeting; and, grave concern about the *public's* right to know about the true facts behind the *appearance* of stigma connected with plaintiff's discharge. Thus, principles of freedom of expression, of free and open debate, of the Speech and Debate clause, and of fair comment and criticism surface which pose issues as to whether the rationale of *New York Times v. Sullivan*, 376 U.S. 254 (1964) requires that the right of public figures to a name clearing hearing be substantially curtailed. For our purposes, we merely suggest that defendants' attorneys and defendants themselves could have (and did, App. 22-23) view this case in the context of *New York Times* (which had already been decided)—and not of *Roth* (which was yet to be decided). Compare *Adams v. Walker*, 492 F.2d 1003, 1009 (7th Cir. 1974) (Stevens concurring).

tation of policies promulgated". *Monell* at 706. We would have looked not at the mere right to control, without any control or direction having been exercised, but at any policy that actually spoke to name clearing hearings. *Id.* at 694.

Moreover, had this been a policy case and not a conduct case, supplemental findings of fact would have been required from time to time in the litigation as successor defendants were substituted to prove that the successor defendants would continue the unconstitutional policies of their predecessors. *Spomer v. Littleton,* 414 U.S. 514 (1974); and, *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974). In contrast, this conduct case, as a Section 1983 damage action, would not be governed by this requirement since it is retrospective and directed at the 1972 conduct of the defendants' predecessors, particularly Paul Roberts.

IV.

**The Legislative History of Section 1983, Common Law and Policy Considerations Support Allowing Local Government Bodies a Qualified Good Faith Immunity in Conduct Cases.**

After extensive discussion of the legislative history, the common law, and policy considerations, this court has already recognized the existence of good faith as a defense on the merits. Modern rules of evidence and civil procedure suggest how such a defense must be raised and indicate what evidence will be received thereunder.

We turn to why such legislative history, common law and policy considerations continue to support the existence of the defense of good faith in conduct cases.



**Legislative History of Section 1983 Revisited**

In *Monell,* this Court carefully reviewed the legislative history of Section 1983 as it pertained to distinctions that must be drawn between the policy case and the conduct case. This Court's discussion of the legislative history as it related to *Monell's* holdings on *respondeat superior* are particularly instructive as are the frequent references to the concepts of "duty" and "obligations" running thru debates on the Sherman Amendment. The Court, citing W. Prosser, Law of Torts, Sec. 69, at 569 (4th Ed. 1971), rejected liability where a city is "blameless"—even if the city as employer had the right to control the actions of a tort-feasor but did not actually exercise such control. *Monell,* at footnote 58, citing *Rizzo v. Goode,* 423 U.S. 362, 370-371 (1976). Such a conclusion was not merely drawn from the legislative history of Section 1983 but also from the language of the statute itself:

> "* * * the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent."

*Monell's* review of the legislative history of Section 1983 does not suggest that tort concepts are to be applied differently between entity defendants and individual defendants. The legislative history, and the statute itself, do not suggest that, merely because a defendant is an entity, he should be handicapped by a prohibition of any defense on the merits of a plaintiff's prima facie case. Among other principles, federalism should caution against such unlimited liability in the face of broad and changing constitutional doctrine. In *Monroe,* Mr. Justice Frankfurter stated:

> "[R]espect for the principles which the Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute . . . into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, or investigator, every clerk in every municipal licensing bureau in this country. The text of the statute, reinforced by its history, precludes such a reading."

365 U.S. 167, 241-42 (1961) (Frankfurter, J., concurring in part and dissenting in part).

**The Common Law**

As early as 1798, even though the idea of a municipality as a corporate entity was still a nebulous affair, the absolute immunity of the state was extended to cities. *Russell v. Men of Devon,* 2 Term Rep. 667, 100 Eng. Rep. 359 (1798). By 1871 the notorious governmental/proprietary distinction had modified the rule of absolute immunity—an unworkable distinction that caused much confusion and left the law in a tangle of disagreement. Studying common law rules as they existed in 1871 pertaining to municipal immunity leaves one with the realization that such immunity has always been recognized and necessary in some form but that the "rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs." *Weeks v. City of Newark,* 162 A.2d 314, affirmed 168 A.2d 11 (1961).

Clearly the immunity of cities in 1871 was qualified—just how it was qualified is an exceedingly difficult question to answer. It is, in fact, a question that does not need answering. All forms of immunities (as opposed



to defenses on the merits) were carried to the several American states from the English crown. Scholars disagree on whether such immunity was based upon the fact that the king could do no wrong or upon the fact that the king was not allowed to do any wrong. One way or the other, the immunities filtered down changing in their form and composition depending upon where they settled.

For example, by 1896 absolute immunity as "a creature of the common law" existed for executives. *Spalding v. Vilas,* 161 U.S. 483 (1896). Such absolute immunity continued to be recognized in *Barr v. Matteo,* 360 U.S. 564 (1959). However, in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the court refused to accept the firmly established, well recognized absolute immunity at common law, for executives—changing the common law rule to accommodate federal interests and purposes under Section 1983 to create a qualified good faith immunity.

Cases such as *Tenney v. Brandhove,* 341 U.S. 367, 418 (1951) and *Scheuer,* supra, require merely that Section 1983 be read in harmony with general principles of tort immunities and defenses; they do not require that those immunities and defenses be applied in their pure form. The common law itself is not pure in form.

In any event, in the 1870's it was well known that, even in cases where absolute immunity was qualified, municipal liability could not be predicated upon holding "the city, in its corporate capacity" liable for simple negligence in the performance of duties imposed upon it by the legislature. *City of Freeport v. Isbel,* 83 Ill. 440 (1877); and, *Coolidge v. Brookline,* 114 Mass. 592 (1874).

There are many legitimate questions and problems which arise when government is afforded absolute im-

munity. The fiction of suits against the individual results which, as we have seen, creates confusion, and, therefore, inequities in variable application of immunity rules in one case versus another. Abrogation of all immunity, qualified and absolute, would result in more than mere confusion. There are manifestly many legitimate reasons and problems which would arise if local government bodies were held to be without immunity. These problems are the same problems that concerned the courts one hundred years ago and should concern this Court today: Is there to be any such thing as a financial limit upon recoveries against the government, either as to any one claim, or as to multiple claims arising out of any one incident? What can be done about protecting the public against nuisance suits? Is mutual insurance advisable to compensate, out of the city treasury, all constitutional torts? These, and innumerable other questions, have always been dealt with both by court and legislator alike; and cannot be ignored in the case at hand. It is not a tort to govern; however, if governing is to be treated as a tort, government should not be held strictly liable. See Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 UCLA L.Rev. 463 (1963); Kennedy and Lynch, Some Problems of a Sovereign Without Immunity, 36 So. Cal. L.Rev. 161 (1963).

One final point on the common law. The court in *Scheuer,* at pages 239 and 240 recognized that the concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity—that the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability:



> "This official immunity apparently rested, in its genesis, on two mutually dependent rationales:* (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

The Court drew these rationales (and acknowledged in a footnote(*) that it did so) from Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 213, 223-224 (1963).

Since this pronouncement in *Scheuer,* the courts have disagreed as to the applicability of both of these rationales when speaking to immunity of the entity. Jaffe himself, the author of these rationales saw no such distinction and felt that they were both pertinent as to immunity of the individual and immunity of the govenrment. Jaffe's logic treated these rationales as "coterminus" (at. p. 213) as they related to governmental and individual immunity.

We respectfully suggest that so much of the absolute municipal immunity as is left from the common law, as identified in *Scheuer,* should be applied in the case at hand.

**Policy Considerations**

For reasons which are not altogether apparent to this writer, local government has been singled out for special treatment as to immunity. Absent consent, the federal government continues to have sovereign immunity and state government continues to have Eleventh Amendment immunity. Under plaintiff's theory, even our employees would have some form of official immunity—but if a plain-

tiff sues the City instead of such official, all vestiges of immunity are to disappear. Perhaps this special treatment is due to the fact "that the City, in its corporate capacity" is viewed differently than the City in its governmental capacity. At common law a municipality was regarded as a private corporation, when acting in its proprietary capacity, as related to its liability in tort, McQuillin, the Law of Municipal Corporations, Chapter 53. But the Fourteenth Amendment is applicable to *state* action, not action by a private corporation. Local government is liable for *state* action under Section 1983 but does not enjoy the protection of the states afforded by the Eleventh Amendment. To also hold that our employees have a qualified immunity in conduct cases, but that we do not, is to start losing our immunity protection from the other direction as well. It is to deny us even a defense on the merits.

Any statement that recognizing a good faith defense for municipalities would deter impetus to change unconstitutional policies ascribes more weight to the importance of compensatory relief in this regard than either the statutory construction of Section 1983 or reason support. Compensatory relief in isloated cases would create a double cost for government—in paying for past good faith conduct and also in paying for a change in policy. If a plaintiff cannot recover damage awards against either the individual or the entity where good faith is involved, then good faith decision making would not be deterred. On the other hand, if a plaintiff may recover against an entity for *all* conduct (whether done in good faith or bad) then *all* decision making will be deterred. A public official would think twice before acting along a course other than the tried and true.



Better that funds should be left for the making of good faith policies than to pay for isolated, non-continuing, good faith deprivations through open-ended city liability.

The policy considerations underlying immunity include realization that the responsibilities of government require that public officials be allowed to engage in conduct which might be tortious if done by private parties. Damage awards are an ill conceived proposition to supplement the traditional remedy for attacking governmental policy (through scope of limited review under the separation of powers doctrine). Allowing the entity a good faith defense from surprise liability and damages would not preclude a plaintiff from bringing such traditional challenges to generally applicable policy (and recovering his costs and attorney's fees if successful). Such challenges (as with the desegregation cases alluded to in *Monell* at footnote 2) carry with them the potential for systematic relief against the policy itself instead of isolated, piecemeal damage awards. Such suits allow vindication of public, versus private, interests.

Yet, a citizen is not without a remedy to protect private interests as well. He will continue to have incentive to sue if he has reason to believe that policy was executed or made in bad faith. He would have reason to put public officials expressly on notice that they should change their conduct. He has the opportunity to apprise public officials of settled law (thereby removing the ability of those public officials to argue that they did not know of plaintiff's constitutional rights under the objective part of the *Wood* test). Giving local government bodies a qualified good faith immunity will not likely result in fewer Section 1983 cases being filed; but, it may encourage out of court settlement of disputes.

Indeed, failure to grant qualified good faith immunity to the entity would serve little purpose other than extending an open invitation to possible plaintiffs to bypass suit against the individual himself (whose act caused the injury and who was intended to be the defendant in abuse of power cases). Why would a plaintiff risk suit against the individual and the problems that a good faith defense could pose when he could merely sue the entity and avoid the inconvenience?

Opposing counsel is undoubtedly aware of the spectre posed by their theories: of municipal liability that would pave the way for federal courts to control major policy and budgetary decisions of local government, of vexatious litigation that would cause decision makers to set avoidance of municipal liability above what might otherwise be in the best interests of the public, and of overwhelming money judgments against a city that could literally cause certain government functions in large cities to cease and cause small governments to suffer total bankruptcy. No "special immunity defense" predicated upon saving local government bodies from *total* bankruptcy will suffice.

V.

**Retroactive, Monetary Relief May Be Available to Plaintiffs in Conduct Cases When They Are the Prevailing Party; However, Presumptions of Validity Springing From the Separation of Powers Doctrine Render the Question of Retroactive, Monetary Relief in Policy Cases Subject to Resolution of Different Issues Involving Whether or Not the Policy Was Voidable or Void Ab Initio.**

A plaintiff who has carried his prima facie cause of action against an individual or governmental defendant in a conduct case may, in accordance with the principles of



*Carey v. Piphus*, 435 U.S. 247 (1978) receive appropriate relief, including retroactive monetary relief. Although Section 1983 on its face says nothing about remedies, two kinds of actual damages are clearly available: First, special damages consisting of medical expenses, lost income and the like, which are proximately caused by a defendant's conduct; and, second, general damages consisting of pain, suffering, humiliation, embarrassment, emotional distress, and damage to reputation. Punitive damages may be awarded—as can equitable relief, unless there is an adequate remedy at law. *Id.* at 257. As the Second Circuit has stated, "there is no logical reason why general principles of damages should not apply to a civil rights action." *Zarcone v. Perry*, 572 F.2d 52, 55 (2nd Cir. 1978).

By definition, a conduct case will arise from some past occurrence and become actionable, when actual injury occurred. We have seen that in addition to such unconstitutional conduct, some continuing policy may also be unconstitutional. Conceivably in such a case the individual defendant could successfully carry his burden of proving good faith immunity; however, such good faith immunity in the conduct case may not be totally applicable in a policy case against the entity. *Lake Country Estates*, supra, fn. 29. Since no policy is challenged in the case at hand we need not fully explore the complexities of joint and several liability between conduct case and policy case defendants; however, we again point out that it is always a plaintiff's burden to properly draft his complaint in sufficient fashion to put the court on notice as to whether he is challenging the constitutionality of a policy or of conduct (lest the court be led to believe that it may review policy itself as if it were a constitutional tort).

Because we suggest that we are not dealing with a policy case (such as on *Monell's* facts) the problem of

retroactively when a policy is held void ab initio is discussed in the footnote.[23]

We note in passing that the problem of retroactivity in a policy case is not totally dissimilar to the considerations of whether good faith immunity is available. *Cox v. Cook*, 420 U.S. 734, 736 (1975) (per curiam); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978); and, compare *Sala*, supra.

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23. There are three questions involving retroactivity which bear comment. The first is whether the Supreme Court's ruling in *Board of Regents v. Roth*, 408 U.S. 564 (1972) somehow had retroactive application upon defendants' conduct in failing to affirmatively offer plaintiff a name clearing hearing. This is simply the good faith issue and is easily answered in defendants' favor by applying the teachings of *Wood* and *Scheuer*.

The second question is whether *Monell* itself should be given retroactive application as has been done in cases such as *Aiello v. City of Wilmington*, 470 F.Supp. 414 (D.C. Del. 1979). On this issue we read the majority's holding in *Monell* that "municipalities can insert no reliance claim which can support an absolute immunity" as indicative of the fact that the Supreme Court had no intention of making *Monell* operate prospectively—as was done, for example, by the Missouri Supreme Court when it abrogated absolute immunity in *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. 1977).

The third question involving retroactivity is not presented in this case (a point which again underscores that this is not a policy case) but is present in *Monell*. This is the issue of whether an ultimate ruling of unconstitutionality as to a policy renders that policy void ab initio, or merely voidable. In other words, in *Monell*, there was a policy of general application and continuing effect compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The effect of judicial rulings declaring existing policies unconstitutional raises difficult questions which clearly show that no principle of absolute retroactive invalidity is justified. Retroactive, monetary relief is, of course, allowed in some cases (although in the federal context such relief is normally specifically directed by Congress, as in Title VII cases allowing back pay for a period of two years). The plaintiffs in *Monell* (see ACLU brief pp. 2-3) may argue these *Sunburst* issues based on cases such as *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *Daniel v. Louisiana*, 420 U.S. 31 (1975); and, *Lee v. Missouri*, 58 L.Ed.2d 736 (1979). Law Review articles such as Rogers, Perspectives on Prospective Overruling, 36 UMKC Law Rev. 35 (1968); and, Mishkin, The Supreme Court, 1964 Term Forward: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv. L.Rev. 56 (1965) should also be consulted.



## VI.

**Denying Equitable and Declaratory Relief and Denying Attorneys Fees to Plaintiff Was Within the Sound Discretion of the Court of Appeals and District Court.**

**Defense on the Merits, a Bar to Any Relief**

Assuming for the moment that the threshold question of whether the plaintiff has been deprived of a right secured by the constitution is met (whether a deprivation of liberty without due process did occur), we are left with the undeniable fact that no pattern of injuries existed; no official policy in the sense of any officially adopted or promulgated regulation, rule or decision of general application and future effect existed; and, nothing, after plaintiff's discharge, continued to have prospective application. Nothing has been placed before this Court or brought to its attention in the section of plaintiff's brief pertaining to Statutory Provisions Involved so that we can see the language, breadth and scope of any challenged policy.

Had plaintiff's cause of action resulted in a declaration that the City's Charter or some other officially adopted policy was unconstitutional in some respect we would have a different case. Here, no such policy is involved. Instead, we are dealing with allegations and proofs about a defamatory statement by a high ranking official—which conduct was automatically imputed to the City itself when the Court of Appeals found that such "conduct amounted to official policy" (Pet. App. A4).

We have suggested that in a conduct case the qualified good faith immunity defense is a defense on the merits. If this is true, defendants' unchallenged success in showing both the objective and subjective parts of its good faith immunity is a complete defense on the elements of plaintiff's prima facie case involving state of mind, duty, proxi-

mate cause, and cause in fact. A bifurcated approach which suggests that a plaintiff can prevail on the merits for equitable purposes but not for retroactive, monetary relief should be rejected.

**Back Pay As Measure of Damages**

The petitioners in *Monell* rejected treating back pay as equitable, when they conceded, in oral argument, that the distinctions between law and equity have long since been abandoned.

In the case at hand, plaintiff has not treated back pay as a part of any request for a hearing (the denial of which is pointed to as the constitutional tort); and, the Court of Appeals readily acknowledged that plaintiff was discharged "for reasons which apparently did not relate to Owen's honesty or integrity" (Pet. App. A37). At trial plaintiff expressly abandoned his request for reinstatement (Tr 69-70). In short, back pay in this case (if a distinction between law and equity can be drawn) is more clearly a measure of damages than an element of equitable relief. It falls on the wrong side of the legal/equitable line for plaintiff's purposes. That back pay is a remedy at law in this case is buttressed by the fact that the Court of Appeals left it to the discretion of the District Court whether to supplement this measure of damages by receipt of additional evidence "bearing upon Owen's likely earnings to retirement in the absence of his being deprived of his good name" (Pet. App. A38).

**The Court's Discretion**

It was well within the discretion of the lower courts to deny equitable relief and declaratory judgment since plaintiff established no legitimate claim of entitlement to back pay. Compare *Garcia v. Daniel*, 490 F.2d 290, 292



(7th Cir. 1973); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579 (7th Cir. 1975); *Sullivan v. Meade Independent School District No. 101*, 530 F.2d 799, 808 (8th Cir. 1976); *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).

The discretion of the Court of Appeals exercised in this case in refusing equitable and declaratory relief is consistent with prior decisions of this court—even decisions where a strong presumption in favor of an award of back pay, as a clear statutory right, is involved. For example, in Title VII cases, the presumption of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) in favor of back pay awards can, in the discretion of the lower courts, be overcome. *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 720 (1978).

**Attorneys Fees**

Of course, since plaintiff is not the prevailing party, and since the Court of Appeals may have felt, again in its discretion, that special circumstances precluded an award of attorneys fees, it was justified in refusing such an award. *Newman v. Piggy Park Enterprises*, 390 U.S. 400 (1968); and, *Hutto v. Finney*, 437 U.S. 678 (1978).

VII.

**Plaintiff Has Failed to Satisfy the Threshold Requirment in This Section 1983 Action of Showing That He Has Been Deprived of Liberty Without Procedural Due Process.**

The trial court determined that there was no causal or other substantial connection between plaintiff's discharge by the City Manager and the statements of Roberts at the Council meeting. Citing, *Paul v. Davis*, 424 U.S.

693 (1976), Judge Van Oosterhout in his dissenting opinion (Pet. App. A41-A45) felt that such a determination was supported by substantial evidence and not clearly erroneous: that no violation of plaintiff's liberty rights in connection with his discharge was established by plaintiff. The district court's findings on whether the plaintiff has been deprived of a right "secured by the Constitution and laws" remain as an additional reason for finding that plaintiff had no claim cognizable under Section 1983 (Pet. App. A56-57, A63, A67, and A78).

We do not know what moved the majority below to make the critical ruling that a name clearing hearing should be given when a discharge is connected with defamation "in the eyes of the public". Perhaps they thought that the public had a right to know the truth or falsity of the Roberts charges—involving, as the charges did, an important local issue concerning two of the most public figures a city has, a police chief and a councilman. However, it is the First Amendment, not the Fourteenth which performs the office of keeping the channels of public debate open. In the First Amendment context, if the Roberts defamation was used in a context in which important public figures of divergent political views routinely use uncomplimentary language about one another—a context in which First Amendment interests override a state interest in enforcing its own law of defamation—it would be "most anomalous to conclude that the subject of the robust comment has been deprived of an interest which is at once protected by the Fourteenth Amendment but which the First Amendment prohibits the state and its political subdivisions from protecting". *Adams,* supra, fn. 22. Indeed, the debates on the Sherman Amendment show that it is precisely this lack of power to act that limits a municipalities' Section 1983 liability.



## CONCLUSION

Treating the Supreme Court's prior vacating order in this case (Pet. App. at A79) as a decision on the merits, see *Board of Trustees of Keene State College v. Sweeney,* ..... U.S. ....., 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting), the Court of Appeals in light of *Monell* properly recognized the existence of the availability of a qualified good faith immunity defense to the City of Independence on the merits of plaintiff's prima facie case.

Respectfully submitted,

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